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Brief of the Commonwealth of Massachusetts  
Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Oct. 30, 1899.

THE STEAMER "GUIDO," JULIAN  
de ORMANCEA, CLAIMANT,

APPELLANT, No. 122.

v.

THE UNITED STATES.

Appeal from the District Court of the United States for  
the Southern District of Florida.

BRIEF FOR THE UNITED STATES AND THE CAPTORS.

JOS. K. McCAMMON,  
JAMES H. HAYDEN,

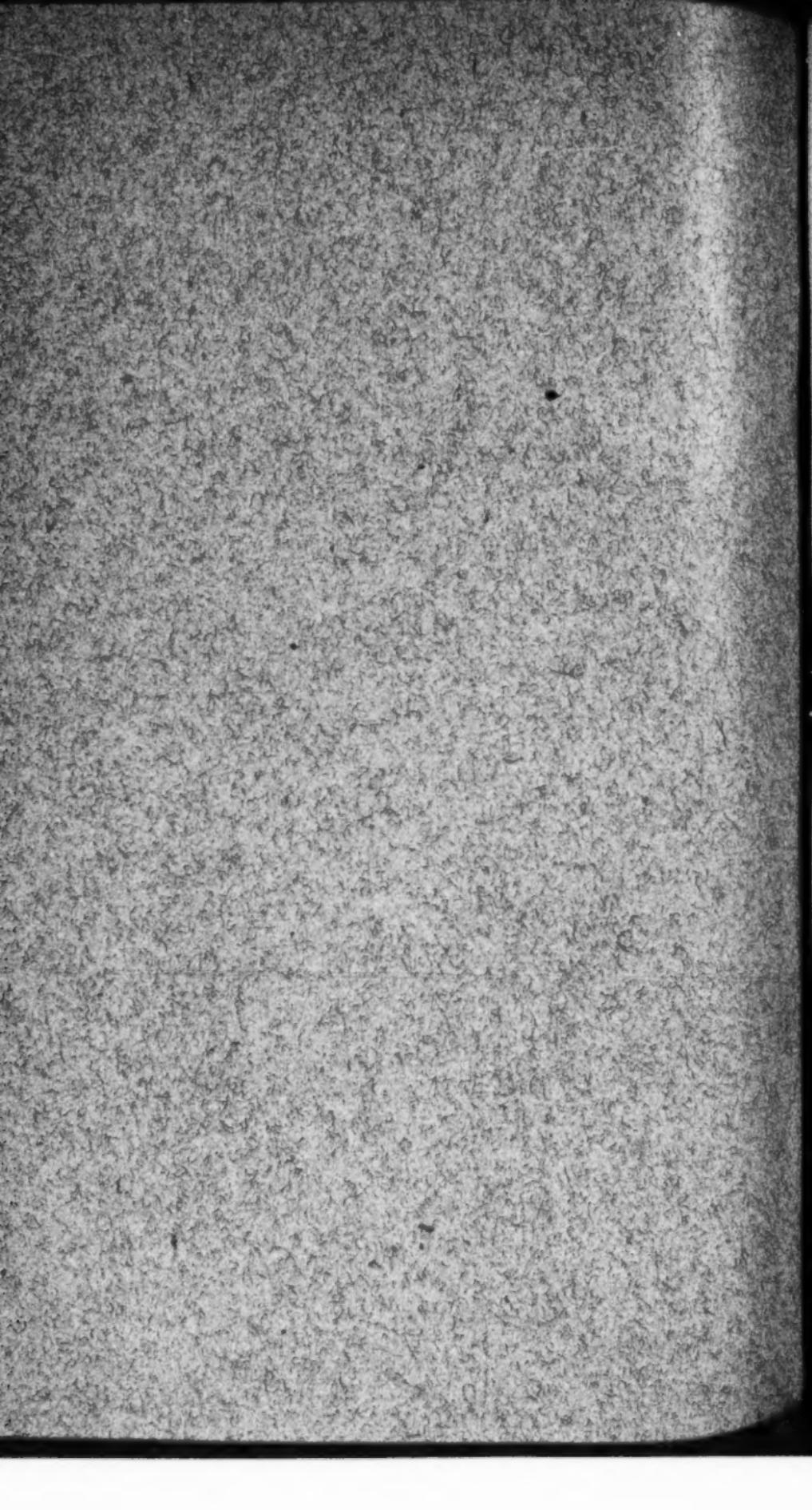
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WASHINGTON, D. C.  
GIBSON BROS., PRINTERS AND BOOKBINDERS.

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ORMAECHEA, CLAIMANT,

APPELLANT,

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THE UNITED STATES.

## Brief for the United States and the Captors.

### STATEMENT OF FACTS.

This is an appeal by the claimant of the Spanish steamer *Guido* from a decree of the District Court of the United States for the Southern District of Florida, by which that vessel was condemned as a prize of war.

The *Guido* was built at Belfast, Ireland, in 1883, and had always borne the name under which she went at the time of her capture. It does not appear for whom she was built, but it was stated by her master and first officer that she had always belonged to La Compania la Flecha, a Spanish corporation of Bilboa, Spain, and had sailed under Spanish registry and the Spanish flag. When captured, she had among her papers a royal patent from

the Crown of Spain, which was issued to Don José Serra y Font, a Spanish subject, on November 15, 1887. She was officered and manned by Spanish subjects, all of whom except her first officer were registered in the Spanish naval reserve.

Her last voyage began at Liverpool, whence she proceeded to Santander, Coruna, and La Puebla, Spain. At Liverpool and at each of these Spanish ports she took cargo composed of various food supplies, all of which was shipped for Havana and other Cuban ports.

She had no charter, nor had she any definite plan for the continuation of her voyage after discharging her cargo in Cuba. Formerly it had been her custom to carry a cargo from Spanish and other European ports to Cuba, and then proceed to some port of the United States for a return cargo of lumber.

She cleared from La Puebla for Havana on the 10th of April and proceeded on her way until the 27th of that month, when she was captured by the U. S. S. *Machias* and *Terror* about seventy miles to the eastward of Havana, and sent to Key West in charge of a prize crew. Here she was libeled. In due course, proofs *in preparatorio* were taken, which included the ship's papers and the deposition of her master and first officer. Subsequently the master appeared in the cause on behalf of the owner, and made claim to the vessel. He then presented a motion asking leave to take further proof, respecting matters set forth in his test affidavit filed therewith. In the affidavit, he alleged that although a majority of the stock of La Compania La Flecha stood in the names of Spanish subjects, and only a minority in the names of British subjects, the latter had possession of all of the certificates of stock, and under the terms of the Company's charter were equitably entitled to the whole of the stock.

He stated that the vessel had been transferred to Spanish registry to obtain the benefit of discriminations made by Spanish law, in favor of Spanish vessels engaged in the West Indian trade: Also that her British stockholders proposed to retain the *Guido* in that trade and under the Spanish flag only so long as they might be able to do so without incurring the risks of war, and that these stockholders were contemplating the transfer of the vessel to British registry, because of the war pending between the United States and Spain, but had not found an opportunity to do so up to the time of her capture: Also that the vessel had customarily made trips from European ports, with cargoes for Cuba, which having been discharged, she would proceed to some port of the United States for a return cargo, either under charter or on berth, and that her voyages depended in a great measure for their profit upon the freight received on the return cargo: Also that he did not know of the war in progress between the United States and Spain, and had no notice of any blockade of Cuban ports: Also that, after giving his deposition *in preparatorio*, he had learned that the vessel was insured against all perils and adventures, including the risks of war, by British underwriters, upon whom the loss would eventually fall, if the vessel were condemned.

This motion was overruled.

On this appeal the claimant presents seven assignments of error. He contends that the vessel was exempt from capture and condemnation as property owned by neutrals, and also because of the privileges extended by the fifth and other articles of the proclamation of the President issued on April 26, 1898. He further contends that he was entitled to take further proofs in respect to the matters set forth in his test affidavit.

We maintain :

I. The *Guido* at the time of her capture was enemy property on the high seas and liable to capture and condemnation as such (Errors 1st, 2d, and 3d).

II. The *Guido* was not exempt from liability to capture and condemnation by virtue of any provision of the proclamation of the President issued on April 26, 1898 (Errors 4th, 5th, and 6th).

III. The claimant's test affidavit and the proofs in the cause do not set up a fact or create a doubt which would have justified the prize court in allowing the claimant to take further proofs (Error 7th).

I.

*The Guido at the time of her capture was enemy property, on the high seas, and liable to capture and condemnation as such (Errors 1st, 2d, and 3d).*

The appellant maintains that inasmuch as British subjects were the legal owners of some, and the equitable owners of the rest of the stock of La Compania La Flecha, and inasmuch as the *Guido* was insured against risks of war by British underwriters, she was neutral property, and exempt from capture and condemnation.

In the case of *The Friendschaft*, 4 Wheat. 105, it appeared that a shipment was made by a firm established in London. Of the three partners, two were British subjects. The third, one Moreira, was domiciled in the kingdom of Portugal. The United States and Great Britain being at war, *The Friendschaft* was captured by an American vessel, and she and her cargo were condemned as prize. From this decree Moreira appealed, claiming that the property, so far as his share was concerned, was

neutral, and not subject to condemnation. Story, J., delivering the opinion of the court, said :

" It has been long since decided in the Courts of Admiralty that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially a hostile trade and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company. The rule, then, being inflexibly settled, we do not now feel at liberty to depart from it, whatever doubt might have been entertained, if the case were entirely new."

In the case of *The Cheshire*, 3 *Wallace*, 231, it was said :

" No principle is more firmly settled than that the property of a commercial house established in the enemy's country is subject to seizure and condemnation as prize, without regard to the domicile of the partners. The trade of a house of this kind is essentially a hostile trade and the property employed in its prosecution is therefore treated as enemy's property, though some of the partners may have a neutral domicile. Such trade tends directly to aid the resources and revenues of the enemy, and, as observed by Mr. Justice Story, ' There is no reason why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share his dangers and losses.' It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce and at the same time possess all the advantages of a neutral character."

*The Frances*, 8 *Cranch*, 335.

*Story's Principles and Practice of Prize Courts*,  
pp. 60-61.

This rule having been established for cases which in-

volve the undivided interest of a neutral, in property owned by him in common with citizens of the enemy's country, no different rule can be applied in a case like the one at bar. The neutral stockholders did not hold any title to the vessel, legal or equitable, in severalty or in common.

It is entirely immaterial whether any or all of the stock of *La Compania La Flecha* was owned by neutrals.

It is alleged that the former owners wished to place the vessel in the West Indian trade, and wanted the pecuniary advantage offered to Spanish vessels. To secure this end they elected to convey the *Guido* to a corporation incorporated under the laws of Spain, and domiciled in Spain; she sailed under the Spanish flag, a Spanish license granted to a Spanish subject, and was officered and manned by Spaniards. Then she became a Spanish vessel, for she could not hold allegiance to two nations at the same time.

In a treatise upon International Law by W. E. Hall, it is said (p. 524):

“Property not impressed with a belligerent character by its origin and belonging to a neutral, becomes identified with a belligerent by being subject wholly to his control or being incorporated into his commerce. Thus, a vessel owned by a neutral, but manned by a belligerent crew, commanded by a belligerent captain and employed in the trade of a belligerent state, is deemed to be a vessel of the country from which she navigates, and the acceptance of a pass or license from a belligerent state, or of sailing under its flag, entails the same consequence.”

By several decisions of this court it has been held that the mere act of sailing under a license granted by a belligerent state is sufficient to condemn a vessel without re-

gard to the object of her voyage or the port of her destination.

*The Ariadne*, 2 Wheat. 143, 147-148.

*The Hiram*, 1 Wheat. 440, 447.

*The Aurora*, 8 Cranch. 203.

*The Julia*, *Id.* 181.

The alleged intention of the British stockholders to restore the *Guido* to British registry is not a material fact, if, indeed, its suggestion, after capture and after the taking of proofs *in preparatorio*, entitle it to be spoken of as a fact. The restoration had not been effected when the *Guido* was captured, and it could not be made afterward.

*The Grey Jacket*, 5 Wall. 342, 368.

It is not to be expected that the shipping of the world shall shift about at will from one flag to another, simply to suit the commercial advantage or wishes of the owners. A ship's nationality and her flag are of more significance than the color of her paint. The latter she may change for economic, or even esthetic reasons, but the former establishes her character as enemy or as neutral property.

## II.

*The Guido was not exempt from liability to capture and condemnation by virtue of any provision of the proclamation of the President issued on April 26, 1898.*  
*(Errors 4th, 5th, and 6th.)*

The fifth article of the proclamation provided :

“ Fifth. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port, bound for any port or place in the United States, shall be permitted to enter such port or place, and to

discharge her cargo, and afterward forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded."

This was intended to cover the cases of Spanish vessels which had sailed from foreign ports, with cargoes, bound for ports of the United States prior to the actual commencement of the war, and had proceeded on their voyages presumably in ignorance of the existence of war.

There seem to be two reasons for the granting of this exemption.

First. A Spanish vessel might have left a distant port without any knowledge that the strained relations of the two countries had developed into war. Such a vessel, bound direct for one of our ports and having no intermediate port of call, would not be likely to gain knowledge of the outside world until made a prize by one of our naval vessels. This would be a harsh experience and one which the more humane methods of modern warfare tend to prevent.

Second. It is desirable, as a matter of policy, that at the outbreak of war, a nation be supplied with foreign goods. Hence that vessels of another nation with which war is likely to ensue, should not be deterred from coming here upon the first, perhaps unfounded, rumors of approaching hostilities. Again: It is desirable that the cargoes of Spanish vessels in many instances containing goods ordered or even bought by citizens of the United States should be allowed to enter our ports.

The *Guido*'s case does not come within the letter or the spirit of the fifth article of the proclamation. In construing this document no exemption can be interpolated which is neither prescribed in express terms, nor follows as a necessary consequence from an express provision.

The *Phoenix*, Spink's Prize Cases, 1.

She did not clear from La Puebla, Spain, on April 10th for any port or place of the United States, but for Havana and other Cuban ports. She had no cargo to deliver at any port of the United States, nor had she even a charter-party to indicate that she intended to proceed hither, after discharging her cargo in Cuba. She was captured on April 27th, six days after the commencement of the war and five days after the blockade of Havana was declared by the President. Had she succeeded in running the blockade and reaching Havana, she could not have cleared for a port of the United States without being subject to capture, because she would have had no cargo and because the proclamation named April 21st as the last day of immunity for such clearances. When taken, she was enemy property at sea and an enemy vessel trading between ports of the enemy. That such property is condemnable is the foundation of the law of prize.

The claimant contends that the indefinite intention of the *Guido*, when she left Spain, to discharge her cargo in Cuban ports and thereafter proceed to some port of the United States with the hope of getting a return cargo for a European port, is sufficient to prove that, when captured, she was engaged in making a voyage which was to be continuous from a foreign port to one of the United States. He argues that this brought her within the immunity granted by the fifth paragraph of the proclamation. The authorities cited in the brief on appeal (pp. 34 to 36) do not support this proposition. If the doctrine could be applied, it would result in the conclusion that the *Guido* was bound on a voyage from one European port to another. On such a voyage she certainly would not have had immunity from capture. But the *Guido* had in contemplation no definite voyage. After reaching the port of Havana and there discharging her cargo,

which was the only business she had on hand, she would have awaited further employment. A vague expectation that such further employment would involve her proceeding to the United States is not sufficient to give her voyage the complexion of one which was to continue beyond Havana.

### III.

*The claimant's test affidavit and the proofs in the cause do not set up a fact or create a doubt which would have justified the prize court in allowing the claimant to take further proofs. (Error 8th.)*

The appellant contends that additional proof should have been ordered respecting matters related in the test affidavit. All material facts were clearly proven by the ship's papers, the deposition of the master of the *Guido* and that of her first officer taken *in preparatorio*. The burden of proving neutral ownership rested upon the claimant. It was proven by these depositions and by the ship's papers that she was enemy property, sailing under the enemy's flag and license, and trading between ports of the enemy. As we have seen, the matters of fact set up in the test affidavit relate principally to this question and are wholly immaterial. If they had been duly and conclusively proven, they would not have tended to prove that the *Guido* was the property of neutrals. The test affidavit does not suggest that the *Guido* was bound upon any voyage, or that she was in any port which would have entitled her to exemption from capture, or that she was so situated as to be entitled to privileges extended by the President's proclamation. No further proof could have disturbed the decree. The District Court did right, in overruling the claimant's motion.

The rule with regard to the ordering of further proofs is this:

*Benedict's Admiralty*, Sec. 612. "These [ship's] papers and examinations *in preparatorio* constitute the only evidence on which the cause is first heard. If, on this evidence there be doubt, or justice require it, the court may, in its discretion, order further proof."

*Story's Principles and Practice in Prize Courts*, pp. 9, 18, 24.

In the case of the *Amiable Isabella*, 6 Wheat. 1, 77, it was said (Story, J.):

"It is to be recollected that, by the settled rule of prize courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied—that the evidence to acquit or condemn shall, in the first instance, come from the ship's papers and persons on board, and, where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to maintain his claim by further proof, but if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty and the neutrality of the property is not established beyond a reasonable doubt, it is the invariable rule of prize courts to reject the claim and decree condemnation of the property."

*The Jenny*, 5 Wall. 183, 188.

*Pizarro*, 2 Wheat. 240. "Nor should the captured crew have been permitted to be re-examined in court. They were bound to declare the whole truth upon their first examination, and if they then fraudulently suppressed any material facts, they ought not to be indulged with an opportunity to disclose what they please, or to give color to their former statements

after counsel has been taken and they know the pressure of the cause. Public policy and justice equally point out the necessity of an inflexible adherence to this rule."

*Grey Jacket*, 5 *Wall.* 342, 368. "This is not a proper cause for an order for further proof. The order is always made with extreme caution, and only where the ends of justice clearly require it.

*The Euphrates*, 8 *Cranch* 385.

*The Hazard*, 9 *Cranch* 205.

We submit that the decree of condemnation should be affirmed.

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